No. 83219-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

RAYMOND MARTINEZ

Petitioner.

RESPONDENT'S RESPONSE TO
MOTION FOR DISCRETIONARY REVIEW

Respectfully submitted:

D. ANGUS LEE
Prosecuting Attorney

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I. FACTS

On February 17, 2004 at approximately 1:45 AM, a VARDA alarm was triggered at a shop at 14825 Road 6 Northwest, a remote rural location near Moses Lake in Grant County. RP April 7, 2004 at 57-59. Grant County deputies Joseph Wester and Greg Hutchison responded to the alarm, suspecting a possible burglary. RP April 7, 2004 at 57.

As Deputy Wester approached the address, he noticed an abandoned truck at the intersection of Road O and 6, one tenth or one quarter mile from the site of the alarm. RP April, 7, 2004 at 59, 115. He contacted Deputy Greg Nevarez by radio and asked him to run the plates. *Id.* Deputy Nevarez determined that the 1981 Chevy pickup (with $3000 fair market value) had been stolen from Newton's Car Corner. RP April 7, 2004 at 116; RP April 8, 2004 at 202-03, 213.

Deputy Hutchison arrived at the shop first, followed soon after by Deputy Wester. RP April 7, 2004 at 60. Deputy Hutchison walked around to the back of the shop, while Deputy Wester shone his headlights on the front of the shop through the fog. RP April 7, 2004 at 60, 81-82. Deputy Wester observed the door to the shop was ajar and had been forced open. RP April 7, 2004 at 60. He could hear someone walking, climbing, rummaging,

and "crashing" through the shop. *Id.*; RP April 8, 2004 at 171, 192-93. Then he observed the Appellant Raymond Martinez exit the building. RP April 7, 2004 at 61.

Deputy Wester drew his gun, shined a light on Martinez, and yelled for him to stop and put his hands up. RP April 7, 2004 at 61-62, 90. Martinez bolted with the deputy in pursuit. RP April 7, 2004 at 62. Martinez ran headlong into a barbed wire fence, somersaulted over it, got back on his feet and kept on running. *Id.* Out in the field, the deputy tackled him to the ground. *Id.*; RP April 8, 2004 at 172-73. And Deputy Hutchison joined in subduing Martinez, who resisted arrest, continuing to struggle until handcuffed. RP April 7, 2004 at 62-63.

Martinez was wearing blue latex gloves and had an empty knife sheath on his belt. RP April 7, 2004 at 63, 65, 111. He told police the knife must have fallen out while he was running. RP April 7, 2004 at 65. Police found the knife in the dirt along the path of pursuit, roughly twenty feet from the shop. RP April 7, 2004 at 66, 111, 127-28. It had a 3 ½ to 4 inch sharp, pointed, fixed blade. RP April 7, 2004 at 69-70, 112-14. After Martinez was left in the patrol car, a hypodermic needle appeared on the seat beside him. RP April 7, 2004 at 100.

Martinez gave a false name, but was easily identified by Deputy Nevarez who arrived soon after the arrest. RP April 7, 2004 at 72-73; RP April 8, 2004 at 205-06. After confronted with his true identity, Martinez attempted to deny that he given a different name, although more than one officer overheard his statement and one of them had contemporaneously recorded the false name and date of birth. RP April 8, 2004 at 206. Martinez admitted that he ran because he was aware that there was an outstanding felony warrant for his arrest. RP April 7, 2004 at 74.

Martinez claimed that his car broke down on I-90 six or seven miles from the shop and that he had been looking for a phone to call for help. RP April 7, 2004 at 74-75, 92, 108. However, police noted that on his walk from the highway, before he reached this empty shop Martinez would have passed approximately twenty residences, where he would have been more likely to have found a telephone and assistance. RP April 7, 2004 at 108-09, 144. Even in the fog, the lights from the residences were visible. RP April 8, 2004 at 139. The shop lights, on the other hand, were not visible from the road. RP April 8, 2004 at 142.

The door to the shop had been kicked in. RP April 7, 2004 at 109, 119. The shop was clearly marked with "no trespassing" signs, lit by outdoor

lamps. RP April 7, 2004 at 117-18. In the trailer at the center of the shop, boxes and cupboards had been emptied on to the floor and drawers were open as if somebody had gone through the contents of the shop. RP April 7, 2004 at 106-07.

Police attempted to confirm Martinez's claim about a broken down car on I-90. RP April 7, 2004 at 120-21. They did not locate any abandoned car in the vicinity. *Id.*

Martinez claimed that he found the gloves in the shop, however, the shop's owner denied that the gloves had been in the shop. RP April 7, 2004 at 106; RP April 8, 2004 at 153. Martinez claimed he had put on the latex gloves, because he noticed rat feces in the shop. RP April 7, 2004 at 106. Police did not observe any evidence of rodents in the shop. RP April 7, 2004 at 86.

The shop's owner Lawrence Dormaier observed that the lock system had been cut with a bolt cutter. RP April 8, 2004 at 149. Mr. Dormaier located the bolt cutters and other burglary tools, which did not belong to the shop. RP April 8, 2004 at 150-52. The hose to a camper trailer in the shop had been cut. RP April 8, 2004 at 154. Along with the broken hose, Mr.

Dormaier found a five gallon gas can, that had been stolen previously. RP April 8, 2004 at 159, 182-83, 187.

Martinez was charged with first degree burglary, first degree theft, third degree malicious mischief, obstructing a law enforcement officer, resisting arrest, and first degree possession of stolen property (PSP). CP 39-40. The theft and PSP charges regarded the stolen pickup. CP 39-40.

During trial, the prosecutor asked that the jury be instructed on second degree burglary as a lesser included crime of first degree burglary. RP April 8, 2004 at 224. The court denied the state's motion. RP April 8, 2004 at 235. However, the jury received instructions on the lesser included offense of criminal trespass. CP 124, 133, 134, 164; RP April 7, 2004 at 52.

Martinez was convicted by jury trial of first degree burglary, third degree malicious mischief, obstructing a law enforcement officer, and resisting arrest. CP 209-226.

II. ARGUMENT

A. PETITIONER'S MOTION FOR DISCRETIONARY REVIEW SHOULD BE DENIED PURSUANT TO RAP 16.9.

The Petitioner's motion for discretionary review should be denied because there was sufficient evidence that the knife carried by the Petitioner during the burglary was a "deadly weapon." See generally, *State v. Gotcher*,

52 Wn. App. 350, 759 P.2d 1216 (1988) (first degree burglary requires evidence defendant used or intended to use knife in a manner consistent with deadly weapon). Here, the jury concluded and the court of appeals affirmed that the knife carried by Mr. Martinez was used or intended to be used in a manner consistent with a deadly weapon. *State v. Martinez*, 132 Wn. App. 1031 (2006) (Div. III). Documents supporting the State's position include relevant records, charging documents, jury instructions, verdict forms, previous State's memorandum to Division III of the Court of Appeals, and trial transcripts. Mr. Martinez's motion for discretionary appeal should be denied.

B. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MR. MARTINEZ OF BURGLARY FIRST DEGREE.

When facing a challenge to the sufficiency of evidence, the court should ask whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d

850 (1990), the court should defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, Martinez was charged with first degree burglary. First degree burglary has all the elements of a second degree burglary plus one of two additional elements. Either the defendant is charged with assaulting a person or with being armed with a deadly weapon while in the building or in immediate flight therefrom. RCW 9A.52.020; RCW 9A.52.030. In Martinez's case, the state alleged that the defendant was armed with a deadly weapon during the burglary. CP 39-40.

Martinez carried a fixed blade knife. Although there was a sheath on Martinez's belt, the knife was not found in the sheath. Nor was it found out in the field where Martinez wrestled with Deputy Wester and Deputy Hutchison. Nor was it found at the barbed wire fence that Martinez somersaulted over. Instead, it was found very close to the shop.

The knife did not fall from a fastened sheath. Either it fell from an unfastened sheath or, more likely, it was not sheathed at all. In either case, it was more readily available for use because it was not fastened down.

We cannot know exactly what happened with the weapon in the police pursuit since not everything that happened was viewed. However, we can hypothesize and draw conclusions from what we do know. This is argument.

Mr. Martinez argued that because he speculated that the knife must have fallen out of the sheath, that he should be believed. Appellant's Brief at 12.

In fact, everything Martinez told police was a lie. He said he had trekked six to seven miles from a broken down car on I-90; but there was no car on the highway. There was only a stolen pickup parked near the shop, which had run out of gas. There was also an empty, previously stolen gas can and a recently cut hose for siphoning gas. Martinez said he entered the shop in order to get help; but there were twenty other more reasonable places to look for help, places that were lit, populated, not marked with "no trespassing" signs, and which, unlike the shop, could be seen from the road. Martinez tried to distract the police by using the term "we." Police searched for other suspects, but found no trace of any other trespasser. They took Martinez's shoes for comparison and found no other footprints. He was the only person there. Martinez claimed he found the gloves in the shop; the

shop owner denied this. Martinez claimed he put on the gloves to avoid rat feces; the police saw no evidence of rodents. When asked for his name, Martinez claimed to be a Robert Ambriss. When immediately confronted with his lie, he then denied he had claimed to be Ambriss only the moment before. He denied this although several officers heard him and one had recorded both the name and date of birth contemporaneously with his statement. If anything, the evidence demonstrates that *nothing* Martinez said that night was truthful. If he said the knife fell, then more than likely it did not.

Because the sheath was unfastened, we can reasonably believe Martinez unfastened it. The prosecutor reasonably argued that because Martinez had unfastened the sheath, he was "using" the knife. RP April 8, 2004 at 244-45. By unfastening the sheath, "[t]he defendant was in the process of pulling it out." RP April 8, 2004 at 244. This is fair argument, a reasonable inference.

The Appellant claimed the prosecutor misstated the evidence and argued that Martinez "had a good grip on the knife." Appellant's Brief at 11. In fact, the prosecutor said, "He *possibly* had a very good grip considering he was using these hospital gloves." RP April 8, 2004 at 245 (emphasis added).

This again is argument. If the knife was out of its sheath, either it fell out or it was taken out. If Martinez pulled it out or was in the process of pulling it out, he would have had a good grip on it because of the gloves.

The Appellant claimed that "the prosecutor argued that Mr. Martinez tried to kill Deputy Wester." Appellant's Brief at 12. Plainly, the prosecutor did no such thing.

If the prosecutor believed Martinez tried to kill someone, he would have charged Martinez with attempted murder or 1st degree assault or 1st degree burglary *by assault*. But the prosecutor charged Martinez with 1st degree burglary by being *armed* with a deadly weapon.

The prosecutor argued that if the knife had not gotten lost before the scuffle, things very well might have turned out differently. "Fortunately for Officer Wester this knife fell [] on the ground. Because if it had not [], we might have a coroner testifying []," RP April 8, 2004 at 245.

This is common sense. It is why we tell children to fasten their seatbelts and not to run with scissors. It is because of all the bad things that can and do happen, that we take these rules so very seriously. It is not "outrageous," "grievous," or "ill-intentioned" for the prosecutor to explain

the policy and very real risk of harm that underlies the law. It is common, as common as the things parents say to children.

When the mother in the film "A Christmas Story" told her small son he could not have a Red Ryder BB gun for Christmas, because "you'll shoot your eye out," she was not calling him suicidal, homicidal, or self-mutilating. She was demonstrating common sense. In the same way, the prosecutor was not calling Martinez a "would-be murderer." Appellant's Brief at 14. He was explaining the common sense policy behind the law.

Children should not be allowed to play unsupervised with a projectile weapon. They will hurt themselves or someone else. And people who carry deadly weapons in the commission of their crimes are going to get someone killed. That is not an "exaggeration." It is what happens. To say otherwise is to live divorced from reality.

The risk of death is precisely the reason the legislature created deadly weapons enhancements. It is the reason there are two degrees of burglaries. It is the policy behind the very law for which the prosecutor was seeking to prove the elements.

The Hard Time for Armed Crime Act was the result of the people's initiative.

(1) The people of the state of Washington find and declare that:

(a) Armed criminals pose an increasing and major threat to public safety and *can turn any crime into serious injury or death.*

(B) CRIMINALS CARRY DEADLY WEAPONS FOR SEVERAL KEY REASONS INCLUDING: Forcing the victim to comply with their demands; injuring or *killing anyone who tries to stop the criminal acts*; and aiding the criminal in escaping.

(c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.

(d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

(2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:

(a) Stigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.

(b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.

(c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

> (d) Bring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes.

1995 Wash. Laws ch. 129 § 1 (Initiative Measure No. 159) (emphasis added).

The prosecutor's argument is legislative policy. The legislature considers the presence of a weapon during the commission of a crime to be extremely serious. Thus, we have weapons enhancements and we have crimes that go up in degree based on a weapon. Whether or not the weapon is used, its very availability results in a much harsher punishment. A second degree burglary has a seriousness level of III, while a first degree burglary has a seriousness level of VII. RCW 9.94A.515.

The prosecutor explained what is common sense and the basis for the law. When someone commits a crime while armed, there is a greatly increased likelihood of someone getting hurt. If someone commits a crime while armed with a *deadly* weapon, the risk is that someone could be *fatally* hurt. The *very presence* of a weapon escalates a situation. It increases the possibility that a second person will react. And it increases the possibility that the possessor will make use of it.

In the dark, the police probably would not have seen the weapon, would not have been able to defend against it. Therefore, the significant risk here was not so much that officers would react to the knife as that Martinez would make use of it.

And everything we know about Martinez makes this a reasonable concern. Martinez did not cooperate with police. Despite the many police cars and lights, despite Deputy Wester's yell, indeed his scream, Martinez took off running. Even after he hit a barbed wire fence, Martinez got up and kept running. And when he was tackled to the ground by a 6'4", 215 pound uniformed police officer, Martinez struggled. RP April 7, 2004 at 91. It took a second deputy plus a set of handcuffs to restrain Martinez. Even restrained, he continued to obstruct. Then Martinez claimed to be Robert Ambriss, stealing someone else's identity and implicating an innocent person in a crime. When confronted with his true identity, Martinez then denied that he had used Ambriss' identity just the moment before. A ridiculous, improbable denial that only demonstrated the lengths he was willing to go to avoid accountability and escape.

Martinez was a difficult, non-compliant suspect. He resisted at every turn. It is reasonable for the prosecutor to suggest that his resistance, had he

not lost his weapon, could have become deadly. "In closing arguments, counsel are allowed to draw and express reasonable inferences from the evidence produced at trial." *State v. Hale*, 26 Wn. App. 211, 611 P.2d 1370 (1980), *review denied*, 95 Wn.2d 1030 (1981))

Common sense is not prejudicial. In fact, the prosecutor should justify his charging decision (i.e. the emphasis on the weapon) to the jury and is required to discuss the deadliness of the weapon. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990) ("Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.") It is an element of the crime. In the same way, when an arson or a burglary is committed in a residence, a prosecutor should emphasize the risk of harm to a person. This risk is what elevates the degree of the crime.

In the light most favorable to the State, there was sufficient evidence to find that the defendant was armed with deadly weapon and convict him of Burglary in the First Degree.

III. CONCLUSION

Based on the facts and the law presented, the Petitioner's motion for discretionary review should be denied.

Dated: October 7, 2009.

Respectfully submitted,

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Prosecuting Attorney

By: _____
Albert H. Lin, WSBA #28066
Deputy Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of RAYMOND MARTINEZ, Petitioner.	NO. 83219-6 RULING

Raymond Martinez was convicted in 2004 of first degree burglary, third degree malicious mischief, obstructing a law enforcement officer, and resisting arrest. His judgment and sentence was affirmed on direct appeal in 2006, and the Court of Appeals dismissed his first personal restraint petition in 2007. In March 2009 Mr. Martinez filed a motion in superior court for relief from judgment, which was transferred to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2). The acting chief judge dismissed the petition as successive without seeking a response from the State. *See* RCW 10.73.140. Mr. Martinez now seeks this court's review. RAP 16.14(c); RAP 13.5A(a)(1).

In his petition Mr. Martinez asserted an issue he did not raise on direct appeal or in his first personal restraint petition: whether there was sufficient evidence he was armed with a "deadly weapon" for purposes of first degree burglary. Insufficient evidence is a ground for relief potentially exempt from the one-year time limit on collateral attack. *See* RCW 10.73.090(1); RCW 10.73.100(4). The acting chief judge dismissed the personal restraint petition as improperly successive because Mr. Martinez failed to show good cause for not raising this issue on direct appeal or in his first petition. *See* RCW 10.73.140. But the better procedure is to transfer the

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petition to this court, where RCW 10.73.140 does not apply. *See In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 265-67, 19 P.3d 1027 (2001); RCW 2.06.030. The acting chief judge could have dismissed the petition if it was untimely, *In re Personal Restraint of Turay,* 150 Wn.2d 71, 87, 74 P.3d 1194 (2003), but as indicated Mr. Martinez's petition might be exempt from the time limit. Accordingly, I will treat Mr. Martinez's collateral attack as if it were filed directly in this court. *See Perkins*, 143 Wn.2d at 266; RAP 16.11(a),(b).

Mr. Martinez contends specifically that there was insufficient evidence that the knife he carried during the burglary was a "deadly weapon." *See generally State v. Gotcher*, 52 Wn. App. 350, 759 P.2d 1216 (1988) (first degree burglary requires evidence defendant used or intended to use knife in manner consistent with deadly weapon). While I find his claim doubtful in light of facts related in the Court of Appeals opinion affirming his judgment and sentence, Mr. Martinez's argument at least merits a substantive response from the State, which it has not provided. *See* RAP 16.9. Accordingly, the State is directed to respond to Mr. Martinez's motion for discretionary review. The response should include relevant records, including charging documents, jury instructions, verdict forms, and trial transcripts. RAP 16.9. The response must be filed by October 12, 2009. Mr. Martinez may file a reply not later than October 26, 2009.

COMMISSIONER

September 15, 2009

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 3.
STATE of Washington, Respondent,
v.
Raymond (NMI) MARTINEZ, Appellant.
No. 23317-1-III.

April 13, 2006.

Appeal from Superior Court of Grant County; Hon. John Michael Antosz, J.
Julia Anne Dooris, Janet G. Gemberling, Gemberling Dooris & Ladich PS, Spokane, WA, for Appellant.

Teresa Jeanne Chen, Albert H. Lin, Grant County Prosecutors Office Law & Justice Center, Ephrata, WA, for Respondent.

UNPUBLISHED OPINION

SWEENEY, C.J.

***1** This appeal follows convictions for a number of crimes following a burglary of a shop. The court failed to instruct the jury on the dollar value necessary to convict of the gross misdemeanor. We therefore reverse the conviction for gross misdemeanor malicious mischief in the third degree and remand for entry of a judgment of guilty for misdemeanor malicious mischief. But we reject Mr. Martinez's claim of prosecutorial misconduct-a claim he raises for the first time here on appeal. We therefore affirm his remaining convictions for burglary in the first degree, obstructing a law enforcement officer, and resisting arrest.

FACTS

Raymond Martinez burglarized a shop in rural Grant County. Deputies responded and caught him, but only after he tried to flee.

Deputy Joseph Wester patted down Mr. Martinez. Mr. Martinez wore blue latex gloves and had an empty knife sheath on his belt. Deputy Wester asked Mr. Martinez where the knife was. Mr. Martinez told him 'it should be in the sheath and that it must have fallen out while he was running.'Report of Proceedings (RP) (Vol.1) at 65. Deputy Wester looked for the knife. He found it 'in the dirt right along the path {they} had run.'RP (Vol.1) at 66. The knife had a fixed blade, three-and-one-half to four inches long.

The State charged Mr. Martinez by an amended information with: (count 1) burglary in the first degree, (count 2) theft in the first degree, (count 3) gross misdemeanor malicious mischief in the third degree, (count 4) obstructing a law enforcement officer, (count 5) resisting arrest, and (count 6) possessing stolen property in the first degree. A jury found him guilty of counts one, three, four, and five. Mr. Martinez appeals.

DISCUSSION

Both Mr. Martinez and the State agree that the court failed to instruct the jury on a necessary element of gross misdemeanor malicious mischief-that the value of the property exceeded $50. They disagree, however, on the proper remedy. Mr. Martinez says the proper remedy is reversal. The State argues that the proper remedy is to remand for entry of a judgment of guilty of simple misdemeanor third degree malicious mischief, which does not require proof of a dollar amount.

Our review is de novo. *State v. Mills,* 154 Wn.2d 1,

7, 109 P .3d 415 (2005). We may remand a case with an instruction to convict an individual of a lesser offense if "the jury necessarily found each element of the lesser ... offense beyond a reasonable doubt ." *State v. Hughes,* 118 Wn.App. 713, 731, 733-34, 77 P.3d 681 (2003) (quoting *State v. Gamble,* 118 Wn.App. 332, 336, 72 P.3d 1139 (2003), aff'd in part, rev'd in part on other grounds, 154 Wn.2d 457, 114 P.3d 646 (2005)).

A person commits the crime of malicious mischief in the third degree if he '{k}nowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.'RCW 9A.48.090(1)(a). Malicious mischief in the third degree is a misdemeanor if the property damage is $50 or less. RCW 9A.48.090(2)(b). It is a gross misdemeanor if the damage exceeds $50. RCW 9A.48.090(2)(a).

***2** Here, the front door of the shop 'was forced open and ajar just a bit.'RP (Vol.1) at 60. The lock had been cut with bolt cutters and the hasp on the door was broken. The deputies heard noise inside the building. Deputy Wester saw Mr. Martinez flee the building.

The boxes and cupboards inside the camp trailer (parked inside the shop) had been emptied on the floor. A hose on the trailer had also been cut.

The elements for misdemeanor and gross misdemeanor malicious mischief in the third degree are identical except for the dollar value of the property damage.RCW 9A.48.090. Monetary value is not an essential element for misdemeanor malicious mischief. RCW 9A.48.090(2)(b); *State v. Tinker,* 155 Wn.2d 219, 222-23, 118 P.3d 885 (2005) (indicating that value is not an essential element of a crime unless it represents a minimum threshold value that must be met). The instruction here correctly shows the necessary elements for the crime of misdemeanor malicious mischief.

Clerk's Papers at 149; RCW 9A.48.090. The jury, then, necessarily found each of these elements when it convicted Mr. Martinez of gross misdemeanor malicious mischief.

We then reverse his conviction for gross misdemeanor malicious mischief in the third degree and remand and instruct the court to enter a judgment of guilty for misdemeanor malicious mischief in the third degree. *Hughes,* 118 Wn.App. at 731, 733-34.

Mr. Martinez next complains that the prosecutor misstated the evidence, misled the jury during closing arguments, and made an inflammatory statement that Mr. Martinez was a would-be murderer. And none of this is supported by any evidence. The State responds that it argued reasonable inferences from the evidence. The dispute centers on the potential inference from Mr. Martinez's empty knife sheath.

Legally sufficient prosecutorial misconduct requires both a showing of misconduct and prejudice. *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). And, of course, a defendant must object at trial unless the comments are 'so flagrant and ill-intentioned' that the resulting prejudice could not have been cured by an instruction to the jury. *Id.* Here are the comments Mr. Martinez assigns error to:

> The defendant on this date and time was in the process of using this knife. As you can see, and you'll have the opportunity to view this knife, this knife has a button and it has to be unbuttoned in order to come out. This is the knife that was there on February 17th, 2004. As you can see, it is sharp. It is deadly. The defendant was in the process of pulling it out. He was wearing what's been identified as Plaintiff's Exhibit 14, these blue latex hospital gloves. He possibly had a very good grip considering he was using these hospital gloves.

> So in the process the defendant had to unsnap this button and then take this knife out. Fortunately for Officer Wester this knife fell on the floor or on the ground. Because if it had not, we wouldn't be talking about Joe Wester as being one person testifying in this case, we might have a coroner testifying about Joe Wester being dead.

*3 RP (Vol.2) at 244-45 (emphasis added).

A fair summary of the evidence here is that Mr. Martinez ran from Deputy Wester. He ran into a barbed wire fence. He fell to the ground, got up, and continued to run. Deputy Wester tackled him. Mr. Martinez struggled. Deputy Greg Hutchison handcuffed Mr. Martinez. Deputy Wester patted down Mr. Martinez. He found the empty knife sheath on his belt. Deputy Wester. asked where the knife was. Mr. Martinez told him 'it should be in the sheath and that it must have fallen out while he was running.'RP (Vol.1) at 65. Deputy Wester did not see Mr. Martinez drop anything as he ran. But he retraced their path and found the knife 'in the dirt right along the path {they} had run.'RP (Vol.1) at 66.

It may have been reasonable to infer that Mr. Martinez would use the knife if it had been available. But there is no evidence that Mr. Martinez reached for the knife, unbuttoned it, removed it, or that he had a good grip on it. There is also no direct evidence that Mr. Martinez would have used the knife to kill Deputy Wester. *Dhaliwal,* 150 Wn.2d at 577.The prosecutor's comments were then improper. *Id.* But the question is whether they are 'so flagrant and ill-intentioned' that any prejudice could not have been cured by an instruction to the jury. *Id.* at 578.And we conclude that they are not. The comment was not 'a deliberate appeal to the jury's passion and prejudice' or an attempt to create a sense of revulsion. *State v. Russell,* 125 Wn.2d 24, 89, 882 P .2d 747 (1994). Overreaching? Yes, but not to the extent that the case should be tried again.

The conviction for gross misdemeanor malicious mischief in the third degree is reversed; we remand for entry of a judgment of guilty of misdemeanor malicious mischief in the third degree. We affirm the convictions for burglary in the first degree, obstructing a law enforcement officer, and resisting arrest.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: KATO and BROWN, JJ.
Wash.App. Div. 3,2006.
State v. Martinez
Not Reported in P.3d, 132 Wash.App. 1031, 2006 WL 954047 (Wash.App. Div. 3)

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83219-6

No. Ct. App. No. 279499
Trial Ct. No. 04-1-00158-0

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,
v.
RAYMOND MARTINEZ, Petitioner,

MOTION FOR DISCRETIONARY REVIEW

RAYMOND MARTINEZ
[Name of petitioner]

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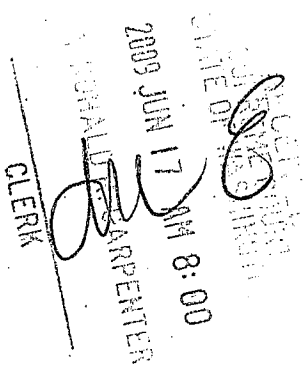

A. Identity of Petitioner

Raymond Martinez, [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision such as a motion for reconsideration.]

Please review Court of Appeals Statement of "Because the court does not have jurisdiction to consider this succissive, untimely petition, it is dismissed."filed May 13, 2009. Order stating instructions for review of that Order may only be obtained by filing a "Motion for Discrectionay Review" in the Washington Supreme Court in the above referenced case.

Also, please reveiw statement of "under 10.73.140, this court lacks jurisdiction to consider a success petition that raises issues that were or could have been raised in a prior petition unless the peritioner shows good cause why he did not raise these issues before.

A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

Does Petitioner meet the requirements of RCW 10.73.100 (1)(2), and (4)?

Does Petitioner show good cause why he did not raise these issues before? The issue of deadly weapon that is.

Is Petitioner's Petition both untimely and successive?

D. Statement of the Case
[The statement should be brief and contain only material relevant to the motion.]

Petitioner, Raymond Martinez, moves this court for granting his motion for relief from judgment and sentence under CrR Rule 7.8(c)(2) and is not barred according to RCW 10.73.100, STATE v. GOLDEN, 112 Wn.App 68, 47 P.3d 587.

Further, Since Petitioner was not represented by an attorney for his first personal restraint petition, he could not be held to the successive petition rule while his second petition show good cause by newly discovered evidence that could not be raised in either direct appeal or the first Petition because the Petitioner is and has been untrained in the law and is not a lawyer. The issue now raise in this second Petition could not have been discovered even with dilegent efforts sooner.

PERSONAL RESTRAINT OF PERKINS, 143 Wn.2d 261, 19 P.3d 1027 (2001)

E. Argument Why Review Should Be Accepted
[The argument should be short and concise and supported by authority.] (Please see PRP)

Petitioner's reveiw should be accepted because he clearly meets the exception under RCW 10.73.100(1)(2)&(4). Starting with No. (1)In Petitioner's eye's, it is newly discovered evidence, that the definition of "armed with a deadly weapon" within first degree burglary has a standard requirement to meet in order to establish the true definition of the meaning to be a first degree burglary. (2) The conviction statute was unconstitution when the defendant was charged and tried by a jury that was never given any instruction at all-regarding the correct and true definition of "armed with a deadly weapon" as used in the first degree burglary charge he was dealt. This failure to instruction violated the Defendant's Right to Due Process. XIV Amendment, US CONST. (3) The STATE'S failure to provide Defendant Due Process on this issue, essentially, and clearly establishes insufficient evidence by lack of proper information causing prejudice towards Defendant and consequently causing an unfair trial and verdict.

F. Conclusion
[State the relief sought if review is granted.]

I Raymond Martinez, Pro se Petitioner, pray that the wisdom of this Court will honor the relief respectfully due under all related statutes, rules, and laws of authority to do so, under the State of Washington, and/or the United States Constition.

DATED this 11th day of JUNE, 2009.

Respectfully submitted,

Petitioner

APPENDIX

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

COPY

May 13, 2009

Raymond Martinez
#795914
PO Box 2049
Airway Heights, WA 99001

CASE # 279499
Personal Restraint Petition of Raymond Martinez
GRANT COUNTY SUPERIOR COURT No. 041001580

Dear Mr. Martinez:

Enclosed is a copy of the Order Dismissing Personal Restraint Petition filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5(a), (b) and (c), review of this Order may be obtained only by filing a Motion for Discretionary Review in the Washington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:slh
Enclosure

c: Honorable John Antosz

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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**27949-9-III**
RAYMOND MARTINEZ,	)	**ORDER DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	

Raymond Martinez seeks relief from personal restraint imposed in his 2004 Grant County conviction of first degree burglary, third degree malicious mischief, obstructing a law enforcement officer, and resisting arrest. On appeal, this court affirmed on all counts except the third degree malicious mischief, which it reduced to a misdemeanor. *State v. Martinez*, 2006 WL 954047 (Wash. App. Div. 3). This court dismissed his first personal restraint petition in August 2007. *See In re Pers. Restraint of Martinez*, Order Dismissing Personal Restraint Petition, No. 25942-1-III (certificate of finality filed 9/10/07). Mr. Martinez filed a CrR 7.8 motion for relief from judgment in Grant County Superior Court on March 13, 2009. The motion was transferred to this court for consideration as a personal restraint petition. CrR 7.8(c)(2).

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In this, his second personal restraint petition, Mr. Martinez contends the evidence is insufficient to show that he was armed with a deadly weapon as required in the charge of first degree burglary. His petition is both untimely and successive.

A petition filed more than one year after the judgment and sentence is untimely under RCW 10.73.090(1) unless the judgment and sentence is invalid on its face, the court lacked competent jurisdiction over the matter, or the petition is based solely on one or more of the exceptions set forth in RCW 10.73.100(1) – (6). These exceptions include: (1) the petitioner has newly discovered evidence; (2) the conviction statute was unconstitutional; (3) the conviction violated double jeopardy; (4) the petitioner pleaded not guilty and the evidence was insufficient to support conviction; (5) the sentence exceeded the court's jurisdiction; or (6) there was a significant intervening change in the law material to the conviction or sentence. RCW 10.73.100.

Mr. Martinez filed this petition more than one year after the certificate of finality on his prior petition. His judgment and sentence is valid on its face and he does not challenge the jurisdiction of the court or argue that any RCW 10.73.100 exceptions apply.

Moreover, under RCW 10.73.140, this court lacks jurisdiction to consider a successive petition that raises issues that were or could have been raised in a prior petition unless the petitioner shows good cause why he did not raise these issues before. *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 737-38, 147 P.3d 573 (2006). To establish good cause, the petitioner must show that an objective impediment external to

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the defense prevented him from raising the issues earlier. *State v. Crumpton*, 90 Wn. App. 297, 302-03, 952 P.2d 1100 (1998) (analogizing to the definition of good cause in RCW 10.95.040(2)). Mr. Martinez offers no explanation why he did not raise the deadly weapon issue on appeal or in the first petition.

Because the court does not have jurisdiction to consider this successive, untimely petition, it is dismissed. *VanDelft*, 158 Wn.2d at 737-38; RCW 10.73.090; RAP 16.11(b). The court also denies his request for appointment of counsel. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150.

DATED: May 13, 2009

KMK ACJ

KEVIN M. KORSMO
ACTING CHIEF JUDGE